No. 16-1363

In the Supreme Court of the United States

KIRSTJEN M. NIELSEN, SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

MONY PREAP, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

Page

I. The statutory text and structure confirm the BIA's interpretation that mandatory detention depends on the alien's criminal history, not when he was arrested 2
II. This Court's precedents confirm that the BIA's interpretation is correct 8
III. Respondents' position would contravene the basic purpose of Section 1226(c) 11
IV. The canon of constitutional avoidance does not provide a basis for creating a new gap-in-custody exception 15
V. The BIA's decision warrants *Chevron* deference 19

TABLE OF AUTHORITIES

Cases:

Barnhart v. *Peabody Coal Co.*, 537 U.S. 149 (2003) 8, 10
Brock v. *Pierce Cnty.*, 476 U.S. 253 (1986) 8
Castañeda v. *Souza*, 810 F.3d 15 (1st Cir. 2015) 6
Clark v. *Martinez*, 543 U.S. 371 (2005) 15
Demore v. *Kim*, 538 U.S. 510 (2003) 9, 12, 16, 18, 19
Hosh v. *Lucero*, 680 F.3d 375 (4th Cir. 2012) 21
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 20
INS v. *Yueh-Shaio Yang*, 519 U.S. 26 (1996) 18
Jennings v. *Rodriguez*, 138 S. Ct. 830 (2018) 2, 5, 15, 17
Lora v. *Shanahan*, 804 F.3d 601 (2d Cir. 2015), vacated and remanded on other grounds, 138 S. Ct. 1260 (2018) 13, 20
Negusie v. *Holder*, 555 U.S. 511 (2009) 21
Regions Hosp. v. *Shalala*, 522 U.S. 448 (1998) 8

Cases—Continued: Page

Rojas, In re, 23 I. & N. Dec. 117 (B.I.A. 2001) 1, 11, 12, 13, 20
Sylvain v. *Attorney Gen. of U.S.*, 714 F.3d 150 (3d Cir. 2013) 9
United States v. *Montalvo-Murillo*, 495 U.S. 711 (1990) 1, 8, 9, 13

Statutes and regulations:

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 20
8 U.S.C. 1103(a)(1) 20
8 U.S.C. 1226(a) 8, 10
8 U.S.C. 1226(c) ..... *passim*
8 U.S.C. 1226(c)(1) ..... *passim*
8 U.S.C. 1226(c)(1)(A)-(D) 2
8 U.S.C. 1226(c)(2) ..... *passim*
8 U.S.C. 1229b(a) 17
8 U.S.C. 1229b(a)(3) 17
8 U.S.C. 1229b(b) 17
8 U.S.C. 1229b(b)(1)(C) 17
8 U.S.C. 1231(a)(4)(A) 8
8 U.S.C. 1252(a)(2) (1988) 13
8 C.F.R.:
Section 242.2(c)(1) (1991) 14

Miscellaneous:

55 Fed. Reg. 24,858 (June 19, 1990) 13
Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. Rev. 143 (2015) 21
H.R. Rep. No. 255, 112th Cong., 1st Sess. (2011) 15

Miscellaneous—Continued: Page

S. Rep. No. 48, 104th Cong., 1st Sess. (1995) 14
Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 14

In the Supreme Court of the United States

No. 16-1363

KIRSTJEN M. NIELSEN, SECRETARY OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

MONY PREAP, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Respondents contend that a criminal alien becomes exempt from mandatory immigration detention under 8 U.S.C. 1226(c) if he is not arrested within some undefined but vanishingly short period of time after release from criminal custody. That interpretation is contrary to the statute's text, context, history, and purpose; it is contrary to this Court's decisions interpreting similar statutes, *e.g.*, *United States* v. *Montalvo-Murillo*, 495 U.S. 711 (1990); it is contrary to the longstanding interpretation by the Board of Immigration Appeals (BIA), after extensive consideration, in *In re Rojas*, 23 I. & N. Dec. 117 (2001) (en banc); and it is contrary to common sense. Under respondents' interpretation, any time a gap in custody has occurred for whatever reason—even if the government was unaware that a criminal alien was being released and thus could not have arrested him immediately—the public would face the very same risks

of recidivism and flight by removable criminal aliens that Congress enacted Section 1226(c) to prevent.

Respondents' focus on the timing of the arrest is fundamentally misplaced. The statutory command that a criminal alien shall be arrested "when the alien is released," 8 U.S.C. 1226(c)(1), simply means that the Secretary's duty to arrest the criminal alien is triggered at that time. This case is instead about the independent statutory prohibition against releasing a detained criminal alien who has already been arrested. 8 U.S.C. 1226(c)(2). That prohibition applies to any "alien described in paragraph (1)," *ibid.*, meaning "any alien who—is inadmissible" or "is deportable" based on his criminal history, 8 U.S.C. 1226(c)(1)(A)-(D). Respondents have the requisite criminal history. So regardless of when they were arrested, the statute prohibits their release. This Court accordingly should reverse.

I. The Statutory Text And Structure Confirm The BIA's Interpretation That Mandatory Detention Depends On The Alien's Criminal History, Not When He Was Arrested

1. Congress has directed that the Secretary "may release an alien described in paragraph (1)" of Section 1226(c) "only if" a narrow witness-protection exception applies. 8 U.S.C. 1226(c)(2). Paragraph (1) describes with specificity who such aliens are: "[A]ny alien who—is inadmissible" or "is deportable" because of certain criminal history or terrorist activity identified in subparagraphs (A) through (D). See 8 U.S.C. 1226(c)(1)(A)-(D). Respondents are aliens who are inadmissible or deportable under those specified provisions, and they agree that the "only" statutory exception does not apply. Section 1226(c) thus "expressly and unequivocally imposes an affirmative *prohibition* on" the Secretary releasing them. *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 847 (2018).

As the Court explained in *Jennings*, paragraph (1) mandates the arrest of any alien "who falls into one of the enumerated categories involving criminal offenses and terrorist activities," and paragraph (2) "then goes on to specify that the [Secretary] 'may release' *one of those aliens* 'only if'" the witness-protection exception is satisfied. *Id.* at 846 (emphasis added) (quoting 8 U.S.C. 1226(c)(2)). Each respondent is "one of those aliens," *ibid.*, so their release is therefore prohibited.

Respondents nonetheless contend that the Secretary may release them on bond. Respondents rely on paragraph (1)'s language providing that the Secretary "shall take into custody any alien who—is inadmissible" or "is deportable" under the specified provisions, "when the alien is released." 8 U.S.C. 1226(c)(1). Respondents interpret the timing clause to mean that, if the Secretary does not arrest a criminal alien until some (undefined) time after he is released, he becomes exempt from paragraph (2)'s prohibition against release.

But paragraph (2)'s prohibition against releasing a detained criminal alien is independent of the directive to the Secretary to arrest the alien, and it does not depend on when he was arrested. The prohibition applies to any "alien described in paragraph (1)." 8 U.S.C. 1226(c)(2). And the phrase "when the alien is released" in paragraph (1) does not describe an alien at all. 8 U.S.C. 1226(c)(1). Rather, it specifies when *the Secretary* is to act. The phrase "when *the alien* is released" takes as a given that "the alien" has already been fully described, namely, as an alien who is deportable or inadmissible under the preceding subparagraphs, (A) through (D). *Ibid.* (emphasis added).

Respondents have no real answer. Their most common response is to elide the words "the alien" so that

the clause reads "when . . . released." Indeed, they omit the words "the alien" more than 50 times in their brief. Resps. Br. 2, 3, 6, 7, 8, 11, 12, 15, 16, 17, 18 n.3, 19, 20, 21, 22, 24, 25, 26, 27, 29, 32 n.8, 40, 41, 42, 43, 44 n.14, 50. But the full statutory text—"when *the alien* is released"—makes little sense unless the Secretary already knows who "the alien" is. Otherwise, the Secretary would not know who to arrest in the first place.

Respondents elsewhere assert (Br. 21) that "an alien described in paragraph (1)" means "*all* of paragraph (1)." But that is clearly wrong, because part of paragraph (1) clearly tells the Secretary to do something without describing the person who is the object of the Secretary's action: Paragraph (1) opens with the statement, "The [Secretary] shall take into custody any alien who * * * ." 8 U.S.C. 1226(c)(1). That passage does not describe the person who the Secretary shall take into custody. Nor does the adverbial timing clause "when the alien is released." That phrase instead says when the arrest should occur.

The layout of the statute drives home the point: The portions directed to the Secretary—the command to arrest any specified criminal alien, and to do so "when the alien is released"—are aligned flush left. See 8 U.S.C. 1226(c)(1). By contrast, the portions of paragraph (1) that describe the alien who shall be arrested are indented and set off with lettered subparagraphs (A) through (D). See *ibid.*

Respondents concede (Br. 23) that the timing clause is adverbial and thus modifies the directive to the Secretary to arrest criminal aliens by telling her when to arrest them. Respondents nonetheless contend (*ibid.*) that the adverbial clause could also describe the alien who should be arrested. They offer the hypothetical

(*ibid.*) of a directive that says: "(1) Approach a man who is (A) a redhead and (B) wearing a blue jacket, when he arrives on the 3:00 train from New York," and "(2) Hand the man described in (1) this package." Respondents correctly say (*ibid.*) that it would "violate the direction if one handed the package to a redheaded man with a blue jacket who arrives on the 4:50 train from Richmond." But that is not because of the meaning of "when he arrives." That is because respondents have added a further description of the man (that he arrives "on the 3:00 train from New York"), so a man arriving on the "4:50 train from Richmond" would be a different person. The statute here contains no such further description.

The real parallel question here is whether, if the courier did not get to the station until after the 3:00 train from New York had arrived, would the courier be excused from giving the package to the redheaded man with the blue jacket who arrived on that train? The obvious answer is no. The courier's lateness does not alter the description of the man or the mandate to deliver the package to him. Rather, it is better to be late than never. If the courier was late delivering the package, he might get into some trouble with his boss. But if he refused to deliver the package *because of his own lateness*, he would probably get fired.

2. Respondents' interpretation further conflicts with the statutory text because it effectively creates a second exception to paragraph (2)'s mandate to maintain detained criminal aliens once they have been arrested—notwithstanding that paragraph (2) expressly provides that there is "only" one exception, namely, for witness protection. 8 U.S.C. 1226(c)(2); see *Jennings*, 138 S. Ct. at 847. Respondents deny (Br. 28-29) that they are trying to create a second exception, asserting they "are not

subject to mandatory detention in the first place." But under respondents' position, individual criminal aliens who were initially subject to mandatory detention cease to be after they have been released for some period of time. That is a second exception to the mandate.

Respondents also fail to answer the "nose-on-the-face obvious" question of how long a gap is too long. *Castañeda* v. *Souza*, 810 F.3d 15, 51 (1st Cir. 2015) (opinion of Kayatta, J.). The preliminary injunctions reach any criminal alien who was not taken into custody "immediately." Pet. App. 8a, 59a. But respondents do not actually say that immediacy is required, *i.e.*, that any gap, no matter how short or how well justified, is too long. Instead, respondents say (Br. 18 n.3) that the statute "does not specify a precise time period." Indeed, they are not even consistent about how to describe the time period, sometimes describing it as "immediate" and elsewhere as "prompt." Compare Resps. Br. 2, 11, 14, with *id.* at 25, 43, 46. They assert in places (Br. 18 n.3) that "two days" is too long, but fail to say (Br. 39-40) whether "within a day" is acceptable.

Nor do respondents say whether any other factors would be relevant. See Gov't Br. 21. What if the alien was sentenced to time served or released without a sentence of imprisonment, so the government could not have learned when he would be released until after that had occurred? What if the Department of Homeland Security (DHS) did not have officers available in the vicinity to effectuate the arrest? What if DHS asked the jurisdiction to notify it when the alien was going to be released, but the jurisdiction declined to do so? What if the alien immediately fled upon his release and went into hiding to delay his arrest? What if, during a gap, the alien committed additional crimes?

Respondents assert (Br. 27) that these questions "can be resolved in future litigation." But the lack of answers goes to the heart of the case. If Congress had intended to create a statute of limitations for mandatory detention, making criminal aliens exempt if they are at large for some period of time, Congress would have *specified that period.*[1]

3. Contrary to respondents' contentions (Br. 21), the government's interpretation does not render the phrase "when the alien is released" superfluous. That phrase makes clear that the Secretary's duty to arrest criminal aliens is triggered when the alien is released from criminal custody—and remains an urgent priority so long as the criminal alien remains at large. See Gov't Br. 17-18. Eliminating the timing clause would eliminate the direction that the arrest should occur upon release—and weaken or eliminate the urgency. That would fundamentally change the nature and tenor of Congress's direction to the Secretary.

The timing clause also makes clear that the Secretary should not arrest a criminal alien *before* he is released from criminal custody. See Gov't Br. 18. Respondents assert (Br. 22) that, "had Congress merely wished to prohibit mandatory detention *before* release, it would have said so," such as by saying that the government must "'not remove an alien who is sentenced to

---

[1] Respondents obtained class certification and class-wide injunctions on the theory that criminal aliens are exempt if arrest is not immediate, and the ultimate question here is whether those injunctions are proper. So respondents cannot defend those injunctions simply by saying (Br. 27-28) that Congress did not permit mandatory detention "months or years after release." If some unspecified or variable period of "months or years" is the test, the injunctions should be vacated and the classes decertified.

imprisonment *until the alien is released from imprisonment.*'" *Ibid.* (quoting 8 U.S.C. 1231(a)(4)(A)). But Congress *did* say so: It directed that the arrest should occur "when the alien is released." And the fact that Congress could have said the same thing using different words does not mean that the words Congress used are superfluous. Rather, it is respondents' interpretation that renders parts of the statute superfluous: They effectively omit the words "the alien" from "when the alien is released" in paragraph (1), and omit "only if" from paragraph (2).

II. This Court's Precedents Confirm That The BIA's Interpretation Is Correct

1. This Court's precedents confirm that, even if DHS does not arrest a criminal alien "when the alien is released" (as respondents would construe that phrase), an arrest at a later time would not exempt him from mandatory detention. In interpreting similar statutes, this Court has consistently held that when Congress has determined that governmental action is so important that it "shall" occur within some specified time, but the government does not act until later, courts should not deprive the public of the benefits that Congress mandated the government's action to produce. See *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 157-158 (2003); *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 459 n.3 (1998); *Montalvo-Murillo*, 495 U.S. at 717-722; *Brock* v. *Pierce Cnty.*, 476 U.S. 253, 260 (1986).

Those cases control here. Respondents contend (Br. 49) that those cases stand for a "'loss of authority' principle" that is inapplicable because DHS would retain the authority under 8 U.S.C. 1226(a) to detain criminal aliens if it provided a bond hearing and the alien did not prove he should be released on bond (or he failed to post

bond). But DHS *would* lose the authority (and be excused from the duty) that Section 1226(c)(2) prescribes: to maintain criminal aliens in detention without a bond hearing. In addition, under respondents' interpretation, if DHS failed to arrest a criminal alien immediately or promptly, the Secretary would thereafter be excused even from her mandatory duty under paragraph (1) to arrest the alien in the first place: that duty applies only "when the alien is released," 8 U.S.C. 1226(c)(1), and respondents interpret that mandate to expire after the passage of some unspecified period of time. See Resps. Br. 16-17, 27.

In any event, this Court has not adopted an obscure technical rule about loss of government authority. Rather, this Court's decisions reflect the common-sense point that important governmental action is better late than never. See *Montalvo-Murillo*, 495 U.S. at 720 ("[T]here is no reason to bestow upon the defendant a windfall and to visit upon the Government and the citizens a severe penalty by mandating release of possibly dangerous defendants every time some deviation from the strictures of [the statutory time limit] occurs."); *Sylvain* v. *Attorney Gen. of U.S.*, 714 F.3d 150, 158 (3d Cir. 2013) (under the "better-late-than-never principle," "[b]ureaucratic inaction—whether the result of inertia, oversight, or design—should not rob the public of statutory benefits"). Here, the statutory benefit—indeed, the entire purpose of Section 1226(c)(2)—is to protect the public from criminal aliens by keeping them detained during their removal proceedings, without the prospect of release. See *Demore* v. *Kim*, 538 U.S. 510, 513 (2003). Governmental delay therefore should not deprive the public of those protections.

Respondents also seek to distinguish the *Montalvo-Murillo* line of cases on the grounds that Congress "specif[ied] a consequence for noncompliance with [the] statutory timing provision" because, in their view, Section 1226(a) would govern release of criminal aliens who were arrested after a gap in custody. Resps. Br. 50 (indirectly quoting *Barnhart*, 537 U.S. at 159) (brackets omitted). But the statute does not say that. Section 1226(a) permits release of an arrested alien on bond "[e]xcept as provided in subsection (c)." 8 U.S.C. 1226(a). Subsection (c) then prohibits the release of "an alien described in paragraph (1)" of that subsection. 8 U.S.C. 1226(c)(2). And paragraph (1) describes those aliens based on their criminal history—not on the timing of their arrest. The timing of the arrest thus has no bearing on whether a detained criminal alien can be released. Accordingly, under *Montalvo-Murillo*, criminal aliens cannot be rewarded with the prospect of release following any governmental delay.

2. Respondents argue (Br. 25) that the government would turn Section 1226(c) "into an open-ended invitation" for the Secretary to arrest criminal aliens "whenever she pleases," rather than "a mandate on the Secretary to act promptly." But respondents are attacking a strawman, and it is their position that renders the statute more discretionary.

The government agrees that paragraph (1)'s mandate to arrest criminal aliens is triggered when the alien is released from criminal custody. See pp. 7-8, *supra*. The difference between the parties' submissions arises only if arrest nonetheless does not occur immediately. Specifically, the disagreement is over (i) whether paragraph (1)'s mandate to arrest a criminal alien expires if the alien has been at large for some (undefined) period

of time; and (ii) whether a gap before arresting a criminal alien exempts him from paragraph (2)'s prohibition against being released.

The answer to both questions is no. On the first point, "when the alien is released" imposes a duty to arrest a criminal alien that begins at the time of his release—and that continues to impose a pressing obligation so long as the alien remains at large. On the second point, the timing of a criminal alien's arrest has no bearing on whether DHS must keep him in custody once he has been arrested: Regardless of when he was arrested, he is still "an alien described in paragraph (1)" because he has the requisite criminal history. Paragraph (2) thus always remains mandatory. *Montalvo-Murillo* confirms that point as well.

III. Respondents' Position Would Contravene The Basic Purpose Of Section 1226(c)

1. The government's interpretation of Section 1226(c) advances Congress's basic aims of arresting, detaining, and removing criminal aliens: Arrest should occur upon release and is always a pressing priority, and once a criminal alien has been arrested he must remain in custody during his removal proceedings. Respondents' interpretation, by contrast, would often allow the release of criminal aliens, and thereby recreate the very problems that Congress enacted Section 1226(c)(2) to prevent: Release would enable those criminal aliens to flee and thus evade removal, or to commit new crimes. And it would depend on a factor—a gap in custody—that is itself "irrelevant for all other immigration purposes." *Rojas*, 23 I. & N. Dec. at 122.

Respondents assert (Br. 29) that Congress sought "to ensure an immediate transition from criminal to immigration custody until the noncitizens' removal." We

agree. But respondents mistake a *means* Congress chose for solving a problem—directing the Secretary to arrest criminal aliens when they are released—for the problem Congress was actually trying to solve.

"Congress was not simply concerned with detaining and removing aliens coming directly out of criminal custody; it was concerned with detaining and removing *all* criminal aliens." *Rojas*, 23 I. & N. Dec. at 122; see *Demore*, 538 U.S. at 513 ("Congress [was] justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers."). Congress was responding to extensive evidence gained from years of real-world experience demonstrating risks of recidivism and flight by criminal aliens who were at large. See *ibid.* Notably, that evidence was not limited to the risks posed by criminal aliens who were taken into immigration custody immediately and then released on bond. See, *e.g.*, *Demore*, 538 U.S. at 518 (discussing evidence that "nearly half" of removable criminal aliens "were arrested multiple times before their deportation proceedings even began"). Indeed, respondents have not identified *any* evidence before Congress that was limited to that specific cohort.

Respondents' interpretation is further unpersuasive because gaps in custody are inevitable and often beyond the government's control. See Gov't Br. 25-27. Respondents note (Br. 46-47) that state and local law enforcement agencies usually share release date information with DHS, and thus enable DHS potentially to arrest the alien immediately. But in a substantial number of cases, DHS is not furnished that information. See *id.* at 46-47 & n.16 (citing figures of non-cooperation on 19,162 occasions). DHS cannot feasibly arrest criminal

aliens immediately upon their release when DHS does not even know when they are being released.

More fundamentally, non-cooperation is only one possible reason for a non-immediate arrest. Other situations include when the criminal alien is sentenced to time served or no imprisonment and thus is released at the moment the judgment is imposed, without prior notice; when DHS lacks "the resources to appear at every location where a qualifying alien is being released," *Lora* v. *Shanahan*, 804 F.3d 601, 612-613 (2d Cir. 2015), vacated and remanded on other grounds, 138 S. Ct. 1260 (2018); or when despite the government's "most diligent efforts," "some errors in the application of the time requirements [still] occur." *Montalvo-Murillo*, 495 U.S. at 720. The fact that gaps in custody will irevitably occur makes it particularly unlikely that Congress "premise[d] the success of its mandatory detention scheme on the capacity of DHS to appear at the jailhouse door to take custody of an alien at the precise moment of release." *Lora*, 804 F.3d at 612 (quoting *Rojas*, 23 I. &. N. Dec. at 128) (brackets omitted).

2. Section 1226(c)'s historical backdrop further supports the government's position. See Gov't Br. 30-35. Section 1226(c) was the culmination of a series of similar statutes mandating that the government "shall" arrest certain criminal aliens upon their release, and "shall not" release such aliens. *E.g.*, 8 U.S.C. 1252(a)(2) (1988). Regulations implementing those earlier provisions in turn provided that the prohibition against releasing such criminal aliens during their removal proceedings applied to any detained alien with the requisite criminal history, full stop. See 55 Fed. Reg. 24,858, 24,859 (June 19, 1990) (8 C.F.R. 242.2(c)(1)). Congress left that basic

two-part command unchanged in Section 1226(c), indicating that Congress did not intend to alter that commonsense rule.

Respondents assert (Br. 34) that "the government has it wrong." But respondents merely quote language from the regulatory preambles stating that arrest was to occur upon the alien's release—a point that is undisputed. Criminal aliens are sometimes arrested later, however, and the regulations specifically addressed what happened after the alien had been arrested. They provided that, "in the case of a respondent convicted * * * of an aggravated felony," the alien "*shall not be released from custody unless*" removal proceedings were complete and certain criteria were satisfied. 8 C.F.R. 242.2(c)(1) (1991) (emphasis added). The word "unless" plainly means that a detained alien with the requisite criminal history shall not be released for any other reason.

Respondents contend (Br. 34) "there is no indication that Congress actually considered the regulation" when it replaced the prior statute with Section 1226(c). But such a regulation had been in place for six years at the time, and Congress had considered "[a]ll aspects of the Government's efforts related to criminal aliens," including "fugitive apprehension" and "detention of criminal aliens." S. Rep. No. 48, 104th Cong., 1st Sess. 5 (1995). In any event, once a phrase "has been given a uniform interpretation by * * * the responsible agency, a later version of that act perpetuating the wording is presumed to carry forward that interpretation," without need for evidence of how many individual Members of Congress actually considered it. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012).

Respondents contend (Br. 32-33) that the "transition period custody rules" would be nonsensical if Section 1226(c) did not mandate arrest immediately upon release, because those rules provided that the Attorney General could delay the effective date of Section 1226(c) and thereby afford flexibility to accommodate short-term resource constraints. But the government agrees that Section 1226(c) requires arrest upon release—and indeed the mandate to arrest continues even if the arrest was not made immediately. See pp. 7-8, *supra*. The transition rules therefore are entirely sensible under the BIA's interpretation of the statute. Respondents also quote (Br. 32 n.8) *dissenting* views on a subsequent bill to amend Section 1226(c) that Congress never enacted. H.R. Rep. No. 255, 112th Cong., 1st Sess. 52 (2011). But the majority views explained that the proposals aimed to "make clear" that the gap in custody was irrelevant, regardless of "the proper reading" of Section 1226(c), because lower court decisions adopting respondents' interpretation "ma[d]e little policy sense." *Id.* at 19.

IV. The Canon Of Constitutional Avoidance Does Not Provide A Basis For Creating A New Gap-In-Custody Exception

Respondents rely (Br. 37-43) on the canon of constitutional avoidance. But as this Court recently emphasized when rejecting another effort by the Ninth Circuit to use avoidance to distort Section 1226(c), "[s]potting a constitutional issue does not give a court the authority to rewrite a statute as it pleases." *Jennings*, 138 S. Ct. at 843. Rather, the canon "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction," and a court is choosing between them. *Id.* at 842 (quoting *Clark* v. *Martinez*, 543 U.S. 371, 385 (2005)).

For the reasons set forth above, there is only one plausible construction here: Criminal aliens do not become exempt from mandatory detention based on the happenstance of a gap in custody, because the phrase "when the alien is released" does not describe who is subject to mandatory detention, and thus does not narrow paragraph (2)'s prohibition against releasing detained criminal aliens. Otherwise, the public would be exposed to the very dangers of recidivism and flight that Congress enacted Section 1226(c) to prevent.

The avoidance canon is further inapplicable here because no serious constitutional doubt arises from the mere delay in arrest by DHS, much less at the moment a criminal alien is released from criminal custody. In *Demore*, this Court squarely upheld Section 1226(c). See 538 U.S. at 513. Respondents argue (Br. 2), however, that *Demore* applies only in "'narrow'" circumstances, and note (*ibid.*) that the alien "was detained within a day of his release." But this Court did not even mention that fact in its opinion, see Resps. Br. 13 (citing the government's brief in *Demore*), and the timing of an alien's arrest was not a factor in the Court's analysis.

Respondents assert (Br. 40) that "when an individual has lived peaceably in the community for years, and may well have strong family ties and a high likelihood of prevailing in her removal hearing—mandatory detention is no longer adequately linked to the government's interest in preventing flight risk and danger." But the class-wide injunctions here are not limited to aliens who have "lived peaceably in the community for years," "have strong family ties," and have a "high likelihood of prevailing." *Ibid.*[2] They exempt any criminal

---

[2] Mandatory detention does not apply if an alien demonstrates in a *Joseph* hearing that he "was not convicted of [a] predicate crime,"

alien who was not arrested "immediately," regardless of the duration of the gap, the reasons for it, what the alien has done in the interim, or what his prospects of success might be. Pet. App. 8a, 59a.

The fact of a non-immediate arrest does nothing to change the alien's criminal history, which is the basis for Congress's categorical determination of dangerousness. A gap in custody also has no bearing on whether the alien's criminal history makes him inadmissible or deportable. And Congress has established no statute of limitations for removing a criminal alien. The mere fact of a gap in custody before arrest by DHS similarly sheds no light on a criminal alien's risk of flight or an immigration judge's ability to predict which criminal aliens will flee. Indeed, once a criminal alien has been arrested and put into removal proceedings where his criminal history will ordinarily establish that he is removable, the alien has something concrete and imminent to flee.

Respondents note that "[i]ndividuals who have been living in the community *may* have increased their eligibility for relief from deportation, such as cancellation of removal, by strengthening their ties to the community." Resps. Br. 41 (emphasis added). But they may not have. Indeed, many criminal aliens are categorically barred from receiving cancellation of removal, see 8 U.S.C. 1229b(a)(3) and (b)(1)(C), so for them any ties to the community would be irrelevant. Cancellation of removal is also a purely discretionary form of relief allowing aliens to remain notwithstanding that they are removable. See 8 U.S.C. 1229b(a) and (b) (Attorney General "may

---

or that DHS "is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention." *Jennings*, 138 S. Ct. at 838 n.1.

cancel removal"). It is an "an act of grace" accorded in the Attorney General's "unfettered discretion." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (citation omitted). A criminal alien whose conviction removes any entitlement to be in the United States but who chooses to pursue such relief thus has sharply diminished interests in being released into society while that request is being considered.

2. Respondents invoke (Br. 8-9, 42-43) anecdotes about named plaintiffs who were arrested after being at large for some years, and whose conduct in the interim suggested that they might not actually have been a flight risk or danger to the community. But anecdotes about hand-picked plaintiffs with unusually long gaps in custody, unusually strong evidence of community ties, and an absence of criminal history in the interim provide no basis for concluding that Section 1226(c) becomes unconstitutional simply because of the passage of time. Rather, the proper way to raise a claim that Section 1226(c) has become unconstitutional as applied under the unusual facts of a particular case is for the individual criminal alien to bring an as-applied constitutional challenge in a habeas corpus action. See *Demore*, 538 U.S. at 532-533 (Kennedy, J. concurring) (discussing such situations); Gov't Br. at 46-50, *Jennings*, *supra* (No. 15-1204) (describing the contours of such a claim). That would be the safety valve here, not judicial imposition of a statute of limitations that Congress has not seen fit to enact.

In addition, the experience of others of the six named plaintiffs confirms that risks of recidivism do not automatically evaporate when a criminal alien has been released for "long stretches of time," Pet. App. 22a, much less within 48 hours. For example, in *Preap*, one of the

named plaintiffs (Mony Preap) had a seven-year gap in custody following his release on his underlying predicate offense—but in the meantime was convicted of battery following an arrest for inflicting severe corporal injury on his spouse. *Id.* at 64a. And in *Khoury*, one of the named plaintiffs (Alvin Rodriguez Moya) had a several-year gap in custody and then was released on bond under the Ninth Circuit's decision in *Jennings*—and, while released on bond, was arrested for and convicted of attempted murder of his ex-girlfriend and murder of her new boyfriend. See Gov't Br. 7 n.3.[3]

Those examples illustrate the inherent difficulty of predicting which removable criminal aliens will reoffend—even with individualized consideration of the alien's conduct during an extended period of time after his release from criminal custody. That is why Congress took immigration judges out of the prediction business for this category of aliens, and instead mandated detention of any alien with the requisite criminal history. This Court determined in *Demore* that "[t]he evidence Congress had before it certainly supports the approach it selected even if other, hypothetical studies might have suggested different courses of action." 538 U.S. at 528. The avoidance canon thus cannot support the class-wide injunctions here.

V. The BIA's Decision Warrants *Chevron* Deference

For the reasons set forth above, Section 1226(c)(2) does not exempt criminal aliens from mandatory detention if there is a gap in custody. At a minimum, the BIA's decision in *Rojas* is entitled to *Chevron* deference.

---

[3] Rodriguez Moya was sentenced to 139 years of imprisonment. See Judgment, *State* v. *Rodriguez-Moya*, No. 3AN-15-03906CR (Alaska Sup. Ct. Aug. 10, 2018).

Respondents contend (Br. 43-44) that *Chevron* is inapplicable because the BIA's interpretation "contravenes the statute's unambiguous demand." But that is backwards, as the BIA adopted by far the best interpretation of the statute, and indeed the only construction that is plausible in context: Paragraph (2) of Section 1226(c) prohibits release of a detained criminal alien regardless of when he was arrested. See *Rojas*, 23 I. & N. Dec. at 127. At the very least, that interpretation—rendered after thoughtful consideration of the statute's text, context, purpose, and history, as well as practical considerations that arise in administering it—is entitled to *Chevron* deference.

For the first time in this litigation, respondents raise a novel argument (Br. 44-45) that applying *Chevron* here "would be at odds with the federal courts' traditional exercise of *de novo* habeas review of executive detention." That argument lacks merit. Regardless of how *Chevron* is applied, federal courts can still engage in habeas review of whether detention comports with due process. See pp. 18-18, *supra*. And this Court's decisions provide no basis for jettisoning the *Chevron* framework if the BIA's decision happens to be reviewed in a habeas action rather than on direct review in a court of appeals, or if the issue happens to involve detention rather than removal or relief from removal. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. 1103(a)(1). And this Court has found it "clear that principles of *Chevron* deference are applicable to this statutory scheme." *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999).

Nor do respondents provide any sound basis for a departure from the *Chevron* framework here. They rely on a law review article—but it candidly admits that federal courts have "universally" applied *Chevron* in immigration-detention cases. Alina Das, *Unshackling Habeas Review*, 90 N.Y.U. L. Rev. 143, 164 (2015); see, *e.g.*, *Lora*, 804 F.3d at 611 (deferring to *Rojas* under *Chevron*); *Hosh* v. *Lucero*, 680 F.3d 375, 380 (4th Cir. 2012) (same). Moreover, the statutory question in this case is narrow and falls well within the BIA's bailiwick. It is undisputed that detention here would comport with the INA if no gap in custody had occurred, or if arrest was not immediate but respondents were provided a bond hearing. The only question is thus whether detention of a criminal alien is valid after a gap in custody but without a bond hearing, which depends on the meaning of the phrase "an alien described in paragraph (1)" and the function of the phrase "when the alien is released." That is a classic question for the BIA to resolve in the first instance. Cf. *Negusie* v. *Holder*, 555 U.S. 511, 517 (2009) ("When the BIA has not spoken on a matter that statutes place primarily in agency hands, our ordinary rule is to remand to give the BIA the opportunity to address the matter in the first instance.") (brackets and quotation marks omitted).

In any event, this case provides no occasion to address any broader question about *Chevron*, because the BIA's decision would be correct even without it: Mandatory detention depends on an alien's criminal history, not the happenstance of when he was arrested.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgments of the court of appeals should be reversed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

SEPTEMBER 2018